

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

**GENE WINDHAM, individually, and  
as the personal representative of the  
Estate of LILLIE MAE WINDHAM,  
deceased,**

**Plaintiff,**

**vs.**

**HUDDLE HOUSE, INC., a foreign  
corporation; HUDDLE HOUSE #389 &  
482, a domestic corporation; GWYNNE  
STRAUGHN, an individual; FRANCIS and  
WYATT SASSER, individuals,**

**Defendants.**

**CASE NO. 2:08CV007**

**OPPOSITION TO MOTION TO DISMISS**

COMES NOW the Plaintiff, and in Opposition to the Motion to Dismiss filed by the Defendant Huddle House, says as follows:

1. Federal Rules of Civil Procedure, Rule 4(m), provides that upon motion, the Court shall dismiss the unserved party “*without prejudice...or direct that service be perfected within a specified time...*” (emphasis added);

2. The Plaintiff has filed summons with the Clerk of Court requesting service on all unserved Defendants, although service has not been perfected yet;

3. Moreover, the Plaintiff has Moved to Remand this action to the Circuit Court of Covington County, Alabama. Upon remand of this action, consideration of the Defendant’s Motion to Dismiss is pretermitted by the Court’s determination that it does not have jurisdiction.

University of S. Ala. v. American Tobacco Co., 168 F.3d 405 (11<sup>th</sup> Cir. 1999); Adams v. Charter

Communications, VII, LLC, 356 F. Supp. 2d 1268 (M.D. Ala. 2005).

WHEREFORE, for the above reasons, the Plaintiff requests this Court to deny the Plaintiff's Motion to Dismiss. In the alternative, however, the Plaintiff requests that this Court withhold a ruling on the Motion to Dismiss until such time as the Court has ruled on the Motion to Remand; and if the Court Orders the case remanded, to remand the Motion to Dismiss to state court, as well.

/s/Thomas B. Albritton  
Thomas B. Albritton (ALB009)  
Attorney for Plaintiff

OF COUNSEL:

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#### **CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the foregoing upon all counsel of record in this cause by electronic service if registered, and if not, by regular U.S. Mail, postage prepaid and addressed as follows, on this, the 15th day of February, 2008:

Mr. John M. Peek  
416 South Three Notch Street  
Andalusia, AL 36420

/s/Thomas B. Albritton  
Of Counsel